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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

NO. [redacted] 41

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County,
Appellants

v.

BRENT STEIN,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATE THREE-JUDGE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 565

CHARLES BATCHELOR, Chief of Police,
City of Dallas; T. C. SNIDER,
V. D. MONAGHAN, R. D. RODGERS, and
HENRY WADE, District Attorney, Dallas County,
Appellants

v.

BRENT STEIN,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATE THREE-JUDGE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, is reported at 300 F. Supp. 602 (1969).

JURISDICTION

The judgment below, by a three-judge court convened under authority of Sections 2281 and 2284, Title 28, U.S.C., was rendered on June 27, 1969, declaring the Texas Obscenity Statute unconstitutional in part and enjoining the enforcement of

the statute. Notice of Appeal was given on July 9, 1969. On August 27, 1969, by order of Mr. Justice Black, the time within which to docket the appeal was extended to October 1, 1969. The Appeal was thereafter timely docketed on September 8, 1969.

Jurisdiction to review the judgment below on direct appeal is conferred by Title 28, U.S.C., Sections 1253 and 2101(b). Probable jurisdiction was noted by the Court on December 8, 1969.

STATUTE INVOLVED

As noted above, the three-judge district court below held that Article 527, Texas Penal Code, was unconstitutional and restrained its enforcement. Article 527 has since been amended, but it read, in pertinent part at the time of the Court's decision as follows:

> "Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions
>
> "Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.
>
> "Sec. 2. Whoever shall knowing offer for sale, sell, give away, exhibit, televise, or otherwise dis-

tribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

"Sec. 3. For purposes of this article the word 'obscene' is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

"Sec. 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

"Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

". . ."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, as held by the court below, Section 1,

Article 527 of the Texas Penal Code is unconstitutional because of impermissible broadness?

2. Whether, as decided by the court below, the Texas obscenity statute, the said Article 527, is unconstitutional in its entirety, including Section 2 thereof, because of Section 1 mere possession of obscenity is defined as a crime as well as public and commercial dissemination, when this prohibition against mere possession is separable from the remaining prohibitions of the statute?

3. Whether Section 3 of Article 527 is unconstitutional for not containing language that requires a jury or judicial finding that the material must have no redeeming social value expressed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)?

4. Whether, as determined by the court below, Article 527, which defines obscenity in terms of *Roth v. United States*, 354 U.S. 476 (1957), is unconstitutionally deficient in its definition of obscenity?

5. Whether, the "redeeming social value" standard defined in *Memoirs v. Massachusetts*, supra, is a defense which must be urged and proved by a defendant charged with a violation of Article 527 or is "no redeeming social value" a matter that must be pleaded and proved affirmatively by the prosecution?

6. Whether, as stated by the court below, *Memoirs v. Massachusetts*, supra, overrules in part, modifies and extends *Roth v. United States*, supra?

7. Does "having a redeeming social value" mean that such material is not "obscene" or that even obscenity is constitutionally protected if it has a "re-

deeming social value," and is the court correct in its statement that *Stanley v. Georgia,* 394 U.S. 557 (1969), overrules *Roth v. United States,* supra, in part, because some "obscenity is afforded First Amendment protection" by the *Stanley* decision?

8. Whether the "community standards" expression used in *Memoirs v. Massachusetts,* refers to the "national" community, the "local" community, or some other geographical or political community?

9. Whether the court below can properly order injunctive relief, as it did, against the peace officers of the City of Dallas and the law enforcement officials of Dallas County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister,* 380 U.S. 479 (1965), and ignored *Cameron v. Johnson,* 390 U.S. 617 (1968), in reaching the conclusion that injunctive relief would lie in the present case?

10. Whether, as decided by the court below in its opinion of June 9, 1969, this cause of action is "a civil rights case brought under the authority of 42 U.S.C., Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated"?

11. What exactly is the scope of review, decision and permissible action of a three-judge federal court, to-wit: (1) does the court properly determine only whether a statute is constitutional on its face and can be constitutionally applied, or (2) should the critical determination be whether the statute is being unconstitutionally *applied* to the plaintiffs; and what is the meaning of the words used first in *Ex Parte Bransford,* 310 U.S. 354 (1940) and referred to in *Evergreen Re-*

view v. Cahn, 230 F.Supp. 498 (E.D. New York 1964); to-wit:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attached as unconstitutional. The latter petition does not require a three-judge court."

12. Was there a substantial federal question presented in this cause that would entitle the court below to rule that Article 527 is unconstitutional and/or did the action of the State of Texas in this cause merely show an "unconstitutionality of the result obtained by the use of the statute"?

STATEMENT OF THE CASE

Brent Stein, the Plaintiff below and Appellee here, published a newspaper known as the "Dallas Notes" twice monthly in Dallas, Texas. (App. 59). As noted in its masthead the paper is, or was, "a member of the Underground Press Syndicate (UPS) and Liberation News Service (LNS)." (Exhibit to Deposition of Truman C. Snider; loose copy of paper in Record on Appeal).

On October 30, 1968, Dallas police officers obtained a search warrant authorizing the search of premises where the newspaper was published. (App. 9-12). Under the warrant, officers seized a number of newspapers, material and printing paraphernalia, and some allegedly obscene photographs. (App. 12, 13). Later, on November 15, 1968, the Dallas police executed another search warrant and seized additional items related to

the publication of the paper. (App. 14-17). In neither the October 30 seizure nor the November 15 seizure was there a prior, adversary determination of obscenity. (App. 62-65, 71-74).

Two misdemeanor charges were filed against Stein charging the possession of obscene materials in violation of Article 527, Texas Penal Code, and such charges were pending at the time of the filing of this suit by Stein, during the pendency of this cause and at the time of the judgment of the court below. (App. 60). The gravamen of the charges was possession, not distribution, of obscene materials. (App. 60).

Stein instituted this action in the United States District Court for the Northern District of Texas, which, after amendment, asked for a declaratory judgment declaring Article 527 unconstitutional and praying for a permanent injunction against the enforcement of the statute by the Dallas police and by Henry Wade, the Dallas County District Attorney. (App. 1, 30-56).

A three-judge court was convened, and it is the judgment of that court, declaring Article 527 unconstitutional and restraining its enforcement, that is being appealed. (App. 75, 79, 93).

Appellants took the position below that Article 527 is constitutional on its face and may be enforced in a constitutional manner. Moreover, however defective the methods used in this particular case by the Dallas police (if defective they be), the Texas obscenity statute should not be held to be unconstitutional and its enforcement in toto be enjoined especially where Stein ignored available state procedures for presenting his claims. Appellants take the same position in this Court.

SUMMARY OF THE ARGUMENT

The court below incorrectly found that the Texas Obscenity Act was unconstitutionally overbroad because it purported to punish private possession (as condemned in *Stanley v. Georgia,* 304 U.S. 557 [1968]) as well as the distribution of obscene materials. The Texas courts, by proper judicial construction could have interpreted the statute so as to bring its terms within proper constitutional limitations and this Court has approved such limiting interpretations.

The confusion that presently exists in the defining of obscenity should be cleared up. Either a workable definition should be provided by the Court or the states should be permitted to adopt their own, possibly differing, standards. *Stanley v. Georgia* should be reconsidered so as to define the right to view obscenity in private as a right of privacy rather than a First Amendment right.

This Court should additionally lay to rest the uncertainty that now surrounds the proper geographical community that must be employed in measuring obscenity. Appellants urge that the community should be that of the several states or that the states be permitted to adopt whatever community standard they feel to be desirable.

Lastly, Appellants urge that this Court issue limiting instructions to the federal district courts governing the issuing of injunctions against state prosecutions. Jurisdiction is being assumed in far too many cases aiding to the already heavy burden of the federal courts and causing breakdowns in state law enforcement.

ARGUMENT AND AUTHORITIES

The questions heretofore set out present, Appellants feel, separate and valid issues. However, some may be more conveniently and meaningfully discussed and argued when considered together.

Questions 1 and 2

(Is Article 527 unconstitutionally overbroad because it purported to punish private possession as well as public distribution?)

1. Whether, as held by the Court below, Section 1, Article 527 of the Texas Penal Code is unconstitutional because of impermissible broadness?

2. Whether, as decided by the court below, the Texas obscenity statute, the said Article 527, is unconstitutional in its entirety, including Section 2 thereof, because, in Section 1 mere possession of obscenity is defined as a crime as well as public and commercial dissemination when this prohibition against mere possession is separable from the remaining prohibitions of the statute?

* * *

The judgment of the court below held Article 527 "to be impermissibly broad and unconstitutional." This holding was grounded in part, on *Stanley v. Georgia*, 394 U.S. 557 (1969), which held unconstitutional a statute which forbade mere private possession of obscenity.

It is true that Section 1 of Article 527 purports to make unlawful, possession of obscenity, and certainly, since Stanley, mere possession of obscene material cannot be punished and that portion of Article 527, which

seeks to enjoin private possession, is unenforceable. However, Section 1 also makes unlawful the *distribution* of obscenity, and its was the contention of Texas below that the entire section of the article should not be declared to be unconstitutional merely because a portion thereof is unenforceable.

Nevertheless, the court below, in its opinion handed down prior to judgment, held that:

> "Applying the above discussion of the scope of the *Stanley* decision to the present case, we conclude that Section 1 as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. . . ."
>
> "Although a number of the phrases of their normal and natural usage connote a public activity, this Court is disinclined to separately analyze each phrase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconstitutional for a failure to confine its application to a context of public or commercial dissemination."

This holding below, not only renders the "distribution" portion of Section 1 inoperative, and thus precludes prosecutions for distribution of obscenity in Texas (except to minors and the "minors" section was also held to be unenforceable), but more critically, the reasoning below would unquestionably strike down many obscenity statutes in other states.

Further, the reasoning (that *Stanley* requires the entire statute to be struck) ignores a part of *Stanley* wherein this Court permits judicial amendment to

criminal statutes. In footnote 7 of the Stanley opinion, this Court refers to an Ohio Statute which prohibited mere possession of obscenity and noted that the Ohio Court at first found that such a prohibition did not offend any constitutional right. Then the Supreme Court noted,

> "Shortly thereafter the Supreme Court of Ohio interpreted the Ohio Statute to require proof of 'possession and control for the purpose of circulation and exhibition'."

And *Miskin v. New York*, 383 U.S. 502, 508, 510 (1966), upheld a restrictive, statutory interpretation by the New York courts of that state's obscenity statute.

This Court has apparently then, given its approval to limiting interpretations placed on state statute by state courts so as to make the statutes comport with constitutional standards and rulings.

Moreover, this Court performed constitutional surgery on the Smith Act (18 U.S.C. §2385) in *Scales v. United States*, 367 U.S. 203 (1961) by judicially adding to the statute elements thought by the Court to be required by the Act to pass a constitutional inspection.

It is interesting to observe that certain federal statutes dealing with obscenity contain no reference or requirement that there be a public or commercial distribution of obscene materials in order to bring the distributor within the purview of the statute. Section 1461, Title 18, U.S.C., declares that obscene materials are non-mailable; the statute then declares that anyone who mails such matter is guilty of a crime without regard to any commercialism. Section 1462, Title 28, U.S.C., makes it a crime to import or transport ob-

scene material with no reference to whether or not the importation or transportation is for the private purpose or use of the transporter or importer; and to come within the statute, there is no necessity that the importation or transportation be for a commercial purpose. The constitutionality of these two statutes has not yet been successfully challenged. See *Armijo v. United States*, 384 F.2d 694 (9th Cir. 1967); Compare *Health v. United States*, 375 F.2d 541 (8 Cir. 1967) and *Cox v. United States*, 370 F.2d 563 (5 Cir. 1967).

Accordingly, whether private distributions be constitutionally protected or not, Article 527 of the Texas Penal Code should not have been declared unconstitutional merely because of the possibility that the language as literally written would seem to cover private distribution of obscene material.

Questions 3, 4, 5, 6, and 7

(The Problem of Defining Obscenity)

3. Whether Section 3 or Article 527 is unconstitutional for not containing language that requires a jury or judicial finding that the material must have no redeeming social value expressed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)?

4. Whether, as determined by the court below, Article 527, which defines obscenity in terms of *Roth v. United States*, 354 U.S. 476 (1957), is unconstitutionally deficient in its definition of obscenity?

5. Whether, the "redeeming social value" standards defined in *Memoirs v. Massachusetts*, supra, is a defense which must be urged and proved by a defendant charged with a violation of Article 527 or is "no re-

deeming social value" a matter that must be pleaded and proved affirmatively by the prosecution?

6. Whether, as stated by the court below, *Memoirs v. Massachussets*, supra, overrules in part, modifies and extends *Roth v. United States*, supra?

7. Does having a redeeming social value mean that such material is not "obscene" or that even obscenity is constitutionally protected if it has a "redeeming social value," and is the court correct in its statement that *Stanley v. Georgia*, 394 U.S. 557 (1969), overrules *Roth v. United States*, supra, in part, because some "obscenity is afforded First Amendment protection" by the *Stanley* decision?

* * *

Questions 3 through 7 are interwoven in that they all deal with the question of whether *Roth v. United States*, supra, is still alive and viable. The Court below determined that *Roth* has expired and that the portion of Article 527 that defined obscenity in the terms of *Roth* was unconstitutionally deficient.

This determination that *Roth* was dead was grounded first on the premises that *Memoirs v. Massachusetts*, supra, amended and added to the constitutional definition of obscenity as prescribed by *Roth*.

Second, the Court below reasoned from *Stanley v. Georgia*, supra, that that portion of *Roth*, which held that obscenity was not constitutionally protected, was overruled by *Stanley* which decision apparently holds that some obscenity, when privately possessed, is, in fact and law, constitutionally sanctioned.

The decision by the court below, that *Roth* has been

overruled or modified by *Memoirs* and *Stanley*, raises serious questions that require ultimate resolution by this Court. This is especially true since *Roth* has been the only case where a majority of the Supreme Court concurred on an obscenity test.

In *Roth* the Court said (354 U.S. at pages 483-485):

> "The unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . All ideas having even the slightest redeeming social importance . . . have the full protection of the guarantee. . . . But implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 and 1956. This is the same judgment expressed by this court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572: 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'"

The Court continued at page 485:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

Finally at page 489, the Court held the test of obscenity is:

"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

As earlier indicated the three-judge court below found that *Memoirs* has added to the definition of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social value." Thus, without such inclusion the Texas statute is unconstitutional.

The portion of *Memoirs* referred by the Court above is the following expression (383 U.S. at 418):

"Under this (*Roth*) definition as elaborated in subsequent cases, three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The "(a)" part of the Memoirs, quotation in the *Roth* definition of obscenity is contained in Article 527, that is, "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex."

The "(b)" part of the *Memoirs* recital, that is, "(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," apparently comes from *Manual Enterprises v. Day*, 370 U.S. 478 (1962) at page 486 of the Court's opinion by Justices Harlan and Stewart. Only these two justices men-

tioned "patent offensiveness" and no majority of the Court agreed on any opinion.

However, the absence of the word "patently offensive" in the Texas statute was not found to be defective by the Court below.

Rather, the Court below found that the absence of any language requiring a finding that the alleged obscenity must be "utterly without redeeming social value," the "c" portion of the *Memoirs* quotation, rendered the Texas statute unconstitutional.

The "utterly without social value" expression seemingly made its appearance in *Jacobellis v. Ohio*, 378 U.S. 184 (1963) (although overtones of this view were noted in *Roth*), wherein Justice Brennan observed at page 191 of the Court's opinion:

> "... obscenity is excluded from constitutional protection only because it is 'utterly without redeeming social importance. ...'"

Only Justices Brennan and Goldberg concurred in the opinion, and Justice Brennan further stated at page 191:

> "recognizing that the test for obscenity (in *Roth*) ... is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard."

Moreover, in a dissenting opinion in *Jacobellis*, Chief Justice Warren, joined by Justice Clark, said (378 U.S. at 200):

> "For all the sound and fury that the Roth Test has generated, it has not been proven unsound, and

I believe that we should try to live with it—at least until a more satisfactory definition is evolved. . . ."

A definite test of obscenity is needed with a judicial determination being made by this Court as to whether measuring obscenity by *Roth* is still constitutionally valid or whether *Memoirs* is the new standard. Certainly, the decision in *Memoirs* does not illuminate or solve the problem. Only Justices Brennan and Fortas and Chief Justice Warren agreed on the Court's opinion reciting the necessity of three elements coalescing in obscenity cases, to-wit, that:

(a) The dominant theme of the material must appeal to the prurient interest in sex (Roth).

(b) The material be patently offensive, and

(c) The material be utterly without redeeming social value.

Indeed, the opinion in *Memoirs*, 383 at 418, points out that the question, which was before the state courts in that case, was whether or not the subject book satisfied "the test of obscenity *established in Roth v. United States.* . . ." (Emphasis added)

Justice White dissented in Memoirs and noted at page 461 of the decision that:

> "To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected because it is inherently and utterly without social value." (Emphasis that of Justice White.)

And Justice Clark, in another dissenting opinion in *Memoirs* called the social value test "novel" (383 U.S.

443), noting that only three justices adhered to it, and observing that such test "rejects the basic holding of *Roth*" (383 U.S. 441).

Later, in 1967, the Supreme Court, in *Redrup v. New York,* 386 U.S. 773, by per curiam opinion, noted that the three element test of *Memoirs* is one espoused by only certain justices in the *Memoirs* case. *Redrup* pointedly did not embrace the *Memoirs* test as that of the Court.

Memoirs poses another question. Under its test, if the dominant theme appeals to the prurient interest in sex and the material is patently offensive, is the material "obscene" with the material being afforded protection if it has some redeeming social value. Or if material has redeeming social value, is it, then, by *Memoirs* definition not obscene regardless of what the material depicts. If the first view is accepted, then some obscenity (that with a redeeming social value) is protected and *Roth* is to that extent overruled.

Certainly, *Stanley v. Georgia,* in deciding that private possession of obscenity is constitutionally protected under the First Amendment would seem to partially overrule *Roth's* holding that obscenity is not so protected.

Accordingly the opinion and judgment of the court below taken in conjunction with decisions of this Court initially present the following problems for resolution in this case.

(1) Is the *Roth* test of obscenity still the law of the land?

(2) If so, may an accused show "a redeeming social

value" as a defense to a charge of distributing alleged obscene materials?

(3) Is the "test" of obscenity now to be the three-pronged "test" noted in *Memoirs*?

(4) If so, must the prosecution prove all elements of the *Memoirs* "test," or is the "redeeming social value" value" element a defense to the charges which must be shown by the defendant?

(5) If the *Memoirs* test is used, in whatever form decreed, does a finding of "a redeeming social value" mean that the material is not obscene or that even obscene material is protected when it has a redeeming social value?

(6) Does *"Stanley v. Georgia"* overrule that part of *Roth* which held that obscenity is not protected by the First Amendment to the Constitution of the United States because private possession of obscenity cannot be prescribed or punished?

The determination in *Stanley v. Georgia*, that the First Amendment guarantees the right of private possession of obscene material, gives rise to an even more profound problems. If a citizen may read obscenity in his own home, how does he obtain the materials? By borrowing, by stealing, or by purchase? If it is permissible to read at home, is it permissible to buy? If obscene materials can be purchased for reading in the home, is not the commercial selling of pornography constitutionally protected as well?

One futher logical extension of *Stanley* should be considered. If obscenity is now (at least in part) within the protection of the First Amendment, does this

mean that one of the areas of legitimate regulation of distribution of obscenity as mentioned by *Redrup v. New York*, 386 U.S. 767, 769 (1969), has been modified or extinguished, i.e., the "pandering" activity by a distributor which intrudes upon the privacy of the members of the public. Now, if obscenity is First Amendment protected, its distribution should logically be protected and this would include advertising and intrusions upon sensibilities and privacy. The ideas protected by the Constitution should, logically, be given the opportunity of consideration and acceptance by the public and this would seem to require protecting the pandering and purveying of these ideas.

Does *Stanley* then, really mean that the states (and the federal government) may only regulate the distribution of obscene materials to children—that all other regulation is dead? Does it mean the football arenas of the country may be used to hold sex circuses during the off season?

Appellants say that *Stanley* does *not* mean that regulation of obscenity is dead. Appellants further say that *Stanley* and its predecessor cases *must* be so interpreted as to permit the regulation of obscenity or our reeling society will suffer still another damaging blow. The day is drawing closer when repeated, punishing blows to the fabric of our society may produce the demise of our country.

Societies are formed by people to promote mutual protection and group cooperation in the fight for survival. Society must have rules which are imposed by the majority upon its members or the individual member may either contribute nothing to the society or be

an actual, positive detriment to it. Along with the regulations set up by society, it is desirable, as is done in this country, to permit the individual an area where he may disagree with the established practices and vocalize his disagreement or his suggestions for change. However, dissent and disagreement must in some wise be curbed at some point or there would never be concerted action, never be mutual enterprise, and so finally, no society. With the death of society, all individual rights which were granted and protected by the society would die. And perhaps the entire people that made up the society would succumb.

Today, the people of our society have never been so free. They have never had so many individual rights diligently guarded by so many people and institutions. And also today, never have there been so much discontent, unhappiness, turmoil and actual violence. Never since the frontier days have there been so much danger to the members of this society as they walk the streets of this country and pursue their daily occupations.

Individual rights are good and desirable and free speech is certainly one of the most important of these individual rights. But instead of extending the freedom of speech and expression at the present time, some consideration must be given to the curbing and curtailing of this right and to the rights of a majority of the citizens. In many areas it is impossible to hold political conventions because the dissent insists on being heard at all times without giving other points of view the chance to be heard and considered. Church services have suffered from an overdose of freedom of speech and in some places and in some churches it is difficult if not impossible to hold an orderly church

service. It has become increasngly difficult in many schools to conduct classes and it would be indeed ironic to find that the exercise of the right of freedom of speech destroyed education and the schools. It has even become difficult to conduct judicial business. Witness the trial of the Chicago Eight where the free expression of ideas by a defendant destroyed the trial in progress and has tarnished the entire judicial processes of this country.

The dangers facing our society must be recognized and the right of free speech must be re-examined. Where the exercise of free expression of ideas threatens the existence of the society (which guarantees free speech), free speech may and should be proscribed.

In the case of obscenity, it is difficult to find any one who will affirmatively maintain that the ideas expressed therein have any social value. This Court should re-examine *Stanley v. Georgia* and if it is felt desirable to permit citizens to read and view obscenity in the home, the decision should be couched in terms of a right of privacy—not in terms of First Amendment free speech. Then, this Court should reaffirm the holding in *Roth* that obscenity is not protected by the First Amendment and either provide a workable standard against which to measure pornography, or more preferably, permit the several states latitude in formulating their own definitions as suggested by Justice Harlan in *Roth*, 354 U.S. at 505.

Question 8

(The Geographical Standard
For Measuring Obscenity)

8. Whether the "community standards" expression

used in *Memoirs v. Massachusetts,* refers to the national community, or some other geographical or political community?

* * *

The Texas obscenity statute, Article 527, as it was written at the time of the decision in this case contained the following language:

> "Provided, further, for the purpose of this article, the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas."

This language was attacked by Stein below as being unconstitutional, Stein claiming that the decisions of this Court required that a national community be the geographical area for determining whether obscene materials appealed to the prurient interest of the people in such community. Stein cited *Jacobellis v. Ohio,* supra, in support of his contention.

While the three-judge court below did not hold the Texas statute unconstitutional for failing to require the national community, the court wrote in its opinion that it assumed "national standards are constitutionally required."

This question, whether a local, state, national or some other geographical community is proper, should be considered and decided by this Court even though the resolution of this issue was not determinative of the decision below.

Jacobellis v. Ohio, supra, cited by the court below as its reason for believing that a national standard or community is required, certainly gives no answer to the problem. Notice should again be made that there

was really no majority opinion in *Jacobellis*. Justice Brennan wrote the opinion that appears first in the decision, joined only by Justice Goldberg; Justice Goldberg wrote a separate concurring opinion in which he stated he agreed with everything Brennan had written; Justice White concurred in the judgment of reversal only; Justices Black and Douglas concurred in the reversal for the reason that they believed that any motion picture has full First Amendment protection; Justice Steward stated that only hard-core pornography can be constitutionally limited, and that the subject matter of the case was not hard-core pornography; Chief Justice Warren, joined by Justice Clark, wrote a dissenting opinion.

In the opinion of Justice Brennan, concurred in by Justice Goldberg, it was said at 378 U.S., page 195:

> ". . . the constitutionality status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding."

Justice Warren, joined by Justice Clark, observed (378 U.S. at 200):

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards not a national standard, as is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none."

Therefore, *Jacobellis* would indicate that two of the Justices that decided the case felt that it was a national standard by which obscenity must be measured, while two other Justices felt that the question of obscenity

must be determined by use of local community standards.

Appellant's, however, suggest a state standard or a rule that would permit the states to elect the geographical area in which to measure obscenity.

Using a national standard would be almost unworkable. What juror or what witness would have the experience to determine that "Book A" appeals to the prurient interest of the residents of Maine, Florida, Arizona, Washington, Alaska, and Hawaii. And that the book is patently offensive to people in Massachusetts, Mississippi, Illinois, Texas, Montana and California. Or that it has no redeeming social value in any of these and the other 50 states.

The problem would not be so acute if the courts accorded to jurors the same competency and standards ascribed to and used by the courts. Judges, regardless of geographical background or social training have no difficulty in examining material without the aid of expert testimony and determining whether the material is obscene.

However, it is really no satisfactory answer to credit or imbue local jurors with national experience in sexual matters and require them to use a national standard in passing on obscenity.

Perhaps, the best answer may be found in the opinion of Justice Harlan in *Roth v. United States* wherein he speaks of the desirability of the several states dealing with obscenity in different ways. At page 505, Justice Harlan writes:

"It has often been said that one of the greater

strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. 'State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books."

Questions 9, 10, 11, and 12

(The Proper Scope of Action by a Three-Judge Court)

9. Whether the court below can properly order injunctive relief, as it did, against the peace officers of the City of Dallas and the law enforcement officials of Dallas County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and ignored *Cameron v. Johnson*, 390 U.S. 617 (1968), in reaching the conclusion that injunctive relief would lie in the present case?

10. Whether, as decided by the court below in its opinion of June 9, 1969, this cause of action is "a civil rights case brought under this authority of 42 U.S.C., Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated"?

11. What exactly is the scope of review, decision and permissible action of a three-judge federal court, to-wit: (1) does the court properly determine only whether a statute is constitutional on its face and can be constitutionally applied, or (2) should the critical determination be whether the statute is being unconstitutionally *applied* to the plaintiffs; and what is the meaning of the words used first in *Ex Parte Bransford*, 310 U.S. 354 (1940) and referred to in *Evergreen Review v. Cahn*, 230 F.Supp. 498 (E.D. New York 1964); to-wit:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

12. Was there a substantial federal question presented in this cause that would entitled the court below to rule that Article 527 is unconstitutional and/or did the action of the State of Texas in this cause merely show an "unconstitutionality of the result obtained by the use of the statute"?

* * *

The foregoing questions, questions 9 through 12, are all related to the propriety of *forming a three-judge* federal court and the scope of permissible action by the court after its formation.

Assuming arguendo that the three-judge court was properly constituted in this case, Appellants urge here, as they did below, that no injunctive relief should have

been issued in this case. It is the state's contention that an injunction, as decreed by the court below, was improper under the principles and doctrines of equity and federalism. *Cameron v. Johnson,* 390 U.S. 617, 618 (1968); *Dombrowski v. Pfister,* 380 U.S. 479, 483-485 (1965).

The Court below, however, relied on *Dombrowski v. Pfister,* supra, as authority for entering the arena of state prosecution at the early stages. This reliance apparently ignored the decision of this Court in *Cameron v. Johnson,* supra.

While the state prosecutions here charged possession of obscene matter and would hence be ineffective under the holding of *Stanley v. Georgia,* supra, Stein did not attempt to have the state courts pass on the validity of the charges prior to filing suit in federal court and accordingly the courts of Texas had no opportunity to apply Stanley to the facts of the pending charges against Stein. The determination of the applicability of *Stanley v. Georgia,* supra, as well as the validity of the Texas obscenity statute could have been tested prior to trial by habeas corpus in the Texas Court of Criminal Appeals. See *Ex Parte Sandford,* 289 S.W. 2d 776 (Tex. Crim. 1956).

It should also be noted that should allegedly obscene items be seized under a search warrant as was done here, Articles 18.25 and 18.26 of the Texas Code of Criminal Procedure specifically provide for a judicial inquiry into the grounds for holding the defendant and the property in question. Under these provisions the magistrate is enjoined to discharge the defendant and restore the property taken from him where he finds

that there were not good grounds for the issuance of the warrant.

There was not a threat of continued state action here after the state courts had quashed arrest warrants and suppressed evidence, as was done in *Dombrowski*. Indeed, the Texas Courts did not have the opportunity to pass on Stein's contentions. Appellant submits that Stein could, and should, have sought the return of the materials in question and a dismissal of the charges in the state courts of Texas, urging there, the arguments and authorities presented to the court below. See *Cameron v. Johnson*, supra, 390 U.S. at page 618.

The contentions of Stein with regard to the proper definition of obscenity, as well as all his other contentions, made in the federal court below, presuppose that state courts will ignore the case law of the Supreme Court and try the cases erroneously. It cannot be presumed that state courts will not accord defendants their full federal and state constitutional rights in state court trials. *Walker v. Birmingham*, 388 U.S. 307, 319 (1967); *Harris v. N.A.A.C.P.*, 360 U.S. 167 (1959). The mere possibility of an erroneous application of constitutional standards will not justify federal courts' disrupting state proceedings. *Cameron v. Johnson*, supra; *Dombrowski v. Pfister*, supra. The state courts, presumably, would have construed Article 527 and applied it in keeping with constitutional principles, and the court below should have assumed that the state courts will do so. *Cameron v. Johnson*, supra; *Nesmith v. Alford*, 318 F.2d 110, 319 F.2d 859 (5th Cir., 1963), cert. denied in *Sullivan v. Nesmith*, 375 U.S. 975 (1964).

In *Brooks v. Briley*, 274 F.Supp. 538 (1967), af-

firmed 391 U.S. 361 (1968), a three-judge court of the Middle District of Tennessee said:

> "In our dual system of government we have rejected the concept of a national police force. Instead, we have committed to state and municipal authorities the primary responsibility for police protection and for the maintenance of law and order. Lacking such responsibility, the federal authority should be allowed to intrude itself through the Federal Courts into the law enforcement duties and activities of the states only when the necessity for such intrusions is clear and unmistakable. . . ."

See also *Cameron v. Johnson*, supra; and *Zwicker v. Boll*, 270 F.Supp. 133 (Three-Judge Court, W.D. Wisconsin 1967), affirmed 391 U.S. 353 (1968).

As Justice Black observed in his concurring opinion in *Byrne v. Karalexis*, —— U.S. ——, 38 L.W. 3221 (December 15, 1969),

> "One of the fundamental aspects of our federal constitutional system requires that our federal courts refrain from interferring in pending state criminal prosecutions except in highly unusual and very limited circumstances."

It is submitted that injunctive relief was not proper under the facts and circumstances as revealed below especially since no attempt was made to secure rulings on the questions presented in the federal proceeding in the courts of Texas.

A companion question is raised by the language of the court below at the beginning of its opinion rendered on June 9, 1969, prior to the final judgment, the court stating,

> "This case involves the constitutionality of Article

527 of the Texas Penal Code, . . . It is a civil rights case brought under authority of 42 U.S.C. section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated."

Arguendo, the facts as revealed in the Court below may have shown an illegal search and seizure and illegal prosecutions for the *possession* of obscenity, but there was no showing, Appellants submit, that the agents of the State of Texas deliberately sought to harass Stein except, perhaps, through zealous enforcement of a then valid Texas obscenity statute.

If this case can be said to fit within the provisions of 28 U.S.C. §1343(3) (4) then almost surely it can be stated that 28 U.S.C., Sections 2281 and 2284 apply. In other words, the plaintiff below could be said to have a right guaranteed by the Constitution of the United States denied because of an unconstitutional Texas statute; and to obtain injunctive relief on this ground, a three-judge district court would be required to determine the issue of unconstitutionality and grant any appropriate injunctive relief.

However, in the guise of a civil rights suit under 42 U.S.C., Sections 1983 and 1985 as determined by the court below (Section 1985 is especially inappropriate), some authority seems to support the proposition that a three-judge federal court is not necessary to order injunctive relief where a state statute is found to be unconstitutional and that one federal judge can issue injunctive relief. See *Holmes v. Danner,* 191 F.Supp. 394 (D.C. Ga. 1960); and *Sheldon v. Fannin,* 221 F. Supp. 766 (D.C. Ariz. 1963).

This gray area involving the proper applicability of

28 U.S.C., Sections 2281 and 2284, in cases where a civil rights violation is charged and relief is grounded upon an unconstitutional state statute, should be eliminated by this Court. It is arguable that any police harassment here was engendered only because of the existence of Article 527 and for the courts to enjoin the operation of Article 527 there must be a determination made, as was done below, that the statute is unconstitutional. Injunctive relief can then only be proper when ordered by a three-judge district court. It follows in this context, or seems to Appellants to follow, that there is no basis for the statement of the court below that this is a civil rights case arising under 42 U.S.C., Sections 1983 and 1985, when the Court went on to determine the unconstitutionality of Article 527.

It is urged that this Court should clear up the confusion which apparently exists in the opinion of the court below on the interrelation of the civil rights provisions of Title 42 and Title 28 and the proper application of each in a case such as is presented here.

There is an additional problem inherent in the case below and in all three-judge federal court cases. Is the scope of the court's inquiry merely to be a determination as to whether the challenged statute is constitutional on its face and is capable of constitutional application by the state authorities? See the statement in the opinion below wherein the Court states at page 6 of the opinion, "Our sole concern is the determination of whether the statute is constitutionally defective on its face," and *Dombrowski v. Pfister,* supra, 380 U.S. at page 491, where the Court speaks of a statute being "attacked on its face." Or should the inquiry be expanded or limited to a determination of whether the

statute is being unconstitutionally applied? See *Ex Parte Bransford,* supra.

The proper boundaries by a three-judge federal court is of critical, nationwide importance in our federal system. Should such a court only decide if a state statute is constitutional on its face or should its inquiry be directed to a consideration of whether the statute, as applied, is unconstitutional; and should this latter inquiry, if proper, be directed to determining whether the statute is *usually* given constitutional application by state authorities or whether the court should look only to the particular situation presented in reaching a decision on constitutional application.

Here, arguendo, Appellant will concede that the procedures used in enforcing Articles 527 were not constitutionally permissible and that, possibly, an unconstitutional result, as defined by *Ex Parte Bransford,* supra, was obtained by the use of the statute. But again, should these circumstances authorize the empaneling of a three-judge federal court? Appellants submit that the permissible scope of action by a three-judge federal court is not now clearly defined and that this question should be answered by the Supreme Court in order to provide guidelines in future three-judge court controversies involving constitutionality of state statutes.

Too many cases are being taken by three-judge courts. Some limiting instructions need to be propounded. Certainly where there is an adequate state remedy, no jurisdiction should be taken.

CONCLUSION

The three-judge federal court below incorrectly held the Texas obscenity statute, Article 527, to be unconsti-

tutional for the reasons given above. Furthermore, whether Article 527 be constitutional or unconstitutional, the court below erroneously, under the principles of federalism, enjoined state officials from enforcing the statute.

It is submitted that the judgment of the court below should be reversed.

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Brief of the Appellants has been served on counsel for the Appellee by depositing the same in the United States Mail, postage prepaid, addressed to Mr. David R. Richards, 205 Texas AFL-CIO Building, 308 West 11th Street, Austin, Texas 78701, this the ____ day of _____, 1969.

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